MAR 6 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 815

HAROLD G. STEINER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Harold G. Steiner, Petitioner, prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on January 7, 1957.

OPINION BELOW.

The opinion of the Court of Appeals is reported in 239 F. 2d 660. It is attached to the copy of the Record as certified by the Court below, and attached herein as Appendix "C".

JURISDICTION.

The judgment of the Court of Appeals was entered on January 7, 1957. Petition for rehearing was denied on February 4, 1957. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254 (1) and specifically:

1. Because the Court of Appeals, by its judgment entered January 7, 1957, has decided an important question of Federal law which has not been, but should be, settled by this Court.

2. Because the Court of Appeals, by its judgment entered January 7, 1957, has decided a Federal question, the effect of which creates a conflict with applicable decisions of this Court.

3. Because the Court of Appeals, by its judgment entered January 7, 1957, has rendered a decision in conflict with the decision of another Court of Appeals on the same matter.

QUESTIONS PRESENTED FOR REVIEW.

1. Whether a United States District Court has discretion to revoke Petitioner's probation for failure to make every effort to pay civil tax liability to the United States, when such civil tax liability has never been legally determined.

2. Whether a probation condition, that a probationer "make every effort to pay tax liability to the United States," is inoperative, if when imposed probationer's civil tax liability had never been determined according to law. And if such a condition is inoperative, may probation be revoked for failure to comply with a condition which never became operative.

STATUTES.

The following statutes are pertinent to the case at bar:

1. Probation Act, Suspension of Sentence and Probation, 18 U.S.C., Sec. 3651;

2. Probation Act, Report of Probation Officer and Arrest of Probationer, 18 U.S.C., Sec. 3653;

3. Internal Revenue Code of 1939, Sec. 272, 26 U.S.C., Sec. 272;

4. Internal Revenue Code of 1939, Sec. 145(b); 26 U.S.C. Sec. 145(b);

5. Internal Revenue Code of 1939, Sec. 3761, 26 U.S.C., Sec. 3761.

As the provisions in the above mentioned statutes are lengthy, their pertinent texts are set out in appendix "A" of this Petition.

FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED.

On December 17, 1952 the Petitioner was indicted in the Eastern District of Wisconsin in a two count indictment charging violation of Title 26 U.S.C., Sec. 145(b). Jurisdiction in the District Court was vested by virtue of 18 U.S.C., Sec. 3231.

On September 14, 1953 Petitioner entered a plea of *nolo contendre* as to Count I of said indictment. Judgment of guilty was entered by the U. S. District Court, Eastern District of Wisconsin as to Count I. Count II was dismissed as to Petitioner.

On June 1, 1954 Judge Patrick T. Stone, sitting in the U. S. District Court, Eastern District of Wisconsin, sentenced Petitioner to pay a fine of $10,000.00 and to be committed to the custody of the Attorney General for a term of eighteen months. The latter portion of the sentence was suspended and Petitioner placed on probation for two years. One of the orders of probation issued by the Court was:

> "It is further adjudged that the prison term be suspended and defendant placed on probation for a period of two years from this date, on condition that defendant *make every effort to pay tax liability* to the United States." (Emphasis supplied) (R. 5).

The District Court itself stated that its interpretation of this condition was that it could be complied with only by a *settlement* and *payment* of the Petitioner's civil tax liability (R. 35).

The fine of $10,000.00 imposed by the Court has been paid by the Petitioner. The amount of tax deficiency alleged in Count I of the indictment also was paid by the Petitioner.

Petitioner has never received a notice of deficiency as required by Sec. 272 of the 1939 Internal Revenue Code.

The Government originally claimed the Petitioner owed in taxes and penalties for the years 1945, 1946 and 1947 the amount of $334,000.00 (R. 28). As a result of conferences between the Government, Petitioner and his representatives, the Government's figure was revised to $244,000.00 (R. 30). No agreement was reached either with the Petitioner or his representatives with respect to this amount.

Thereafter the Internal Revenue Service caused to be prepared certain "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax", Form 870 M as to Petitioner for the year 1945 (R. 115) and a similar document for the Petitioner and his wife, Ollie Mae Steiner, for the years 1946 and 1947 (R. 116).

In addition to the printed material on each of the Waivers and the amount of deficiency, etc., claimed for the respective years, the Respondent inserted by typewriter on each of the Waivers the following language:

> "This waiver of restriction *is subject to acceptance by the Commissioner* on the basis of the settlement hereinbefore proposed and if not accepted it will be of no force or effect.
>
> "*If this proposal is accepted*, the taxpayer agrees not to file thereafter any claim for refund for the year 1945 (1946 and 1947); and upon request of the Commissioner, will execute at any time a final closing agreement under the provisions of Section 3760 in the Internal Revenue Code." (Emphasis supplied)

There is no testimony or evidence in the record to indicate the "Commissioner" had accepted the Waiver of Restrictions. Steiner testified it was also his understanding that if the waivers were signed he had a right to submit an offer in compromise which, if not accepted, would nullify the waivers.

A Government witness (Mr. Steers) testified that the waivers *were intentionally subject to acceptance by the Commissioner* of Internal Revenue (R. 33).

Philip J. P. Kozik, Internal Revenue Service employee, testified that the Waivers were signed in order to give the Petitioner the right to make his offer in compromise (R. 41).

The record shows the Waiver of Restrictions with the conditions set forth thereon were received by the Internal Revenue Service on August 14, 1954 (R. 36, 115, 116).

Thereafter Petitioner submitted an Offer in Compromise, Form 656 C, on September 10, 1954 (R. 117).

The Petitioner claimed inability to pay a larger sum without undue hardship to himself and family. This offer in compromise was rejected by Respondent in May of 1955 (R. 43).

The Petitioner submitted a second offer in compromise dated June 1, 1955, received by the Internal Revenue Service on June 21, 1955 (R. 131). This offer in compromise was supported by an affidavit (R. 134) which contested the accuracy of the deficiencies claimed by the Government for the years 1945, 1946 and 1947. This offer also contained a request for a conference.

In September, 1955, the Internal Revenue Service rejected the second offer in compromise (R. 46). There is no evidence that a conference was held prior to the date of the rejection of the second offer in compromise.

The evidence further shows that sometime between the rejection of the first offer of compromise in June of 1955 and the Petitioner's submission of a second offer of compromise in September of 1955, representatives of the Internal Revenue Service arrived at Petitioner's home to

serve a seizure warrant (R. 49-51). During the discussion the Government representatives admitted they had no power to effect a settlement in the case. After discussing the matter the Internal Revenue Service employees left the Petitioner with the understanding that if the Petitioner would file a new offer of compromise and revise the reasons for the same, the Internal Revenue Service would consider it. The record shows Petitioner did that.

The United States Government also seized $1,564.39 upon a levy of the taxpayer's account in the Bank of Mauston, Mauston, Wisconsin (R. 58).

On March 20, 1956, the Probation Officer of the U. S. District Court, Western District of Wisconsin, filed a petition in the aforesaid Court alleging the Petitioner was not complying with the Court's order relative to probation in that he had failed to make every effort to pay the tax (R. 6).

On April 24, 1956, the Petitioner, without attorney, appeared before Judge Patrick T. Stone in the United States District Court, Western District of Wisconsin, at Madison, Wisconsin, for a hearing on the probation officer's petition to revoke probation. After a discussion with the Court as to the failure of Petitioner to have counsel, the Petitioner was advised by Judge Stone:

> "You don't really need a lawyer in this proceeding. All you have to do is state what the facts are. That's all." (R. 25).

At the hearing with respect to revocation of probation held on April 24, 1956, the United States Government produced five witnesses, all employees or former employees of the Internal Revenue Service.

Thereafter the matter was continued by Judge Stone until May 31, 1956, the last day of Petitioner's probation, at which time the Court revoked Petitioner's probation and the Petitioner was committed to the custody of the Attorney General to serve the eighteen month sentence theretofore imposed by the Court (R. 9-10).

On May 31, 1956, after the Court had revoked probation the Court granted the Petitioner a stay of execution of thirty (30) days (R. 110). Thereupon the U.S. Attorney requested the Court's assistance in seeking to interrogate the Petitioner as to the location of certain assets which could be applied to his undetermined liability. The Court immediately attempted to ascertain the location of certain assets of the Petitioner. Upon Petitioner's refusing to disclose the whereabouts of these assets, the Court thereupon vacated and set aside his order granting the stay of execution of thirty days (R. 112).

Petitioner was released on bail by order of the Court of Appeals pending his appeal, after serving approximately three months of his sentence.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

The Court below has decided an important question of Federal Law which has not been settled by this Court the effect of which creates a conflict with applicable decisions of this Court.

At the outset it is necessary to establish that the question on review of a revocation of probation is whether there has been an abuse of discretion. *Burns* v. *United States,* 287 U. S. 216. This Court in *Burns* recognized that discretion is not a formless matter but that its exercise implies conscientious judgment *not arbitrary action,* nor should the probationer be made the victim of whim or caprice.

Petitioner's probation was revoked for failure to "make every effort to satisfy his tax liability to the United States". The record is clear the District Court interpreted this condition to mean a *settlement* and *payment* of a civil tax liability not then legally determined. The record is clear the Petitioner's civil tax liability to this date has never been legally determined. Therefore, it was impossible for Petitioner to breach the condition of his probation, as it is impossible for him to pay or make any effort to pay a tax liability which is still undetermined.

Yet the Court of Appeals affirmed the District Court and held, "But *effort to* pay is what was required of Steiner." Pay what amount? Apparently, *effort* to pay *any amount,* although no amount was due and owing, is what the Court of Appeals demanded. It is obvious such must be contrary to the law.

Settlement has been abandoned and disregarded. The Government contends Petitioner's tax liability was determined when he signed the conditional waivers, Form 870 M.

In *Botany Worsted Mills* v. *United States*, 278 U. S. 282, this Court held that compromise agreements in tax matters may only be effected in accordance with the statutory directives of Congress. This Court stated:

> "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." (at page 289).

Congress has specifically provided the procedure for determining a civil tax liability. Section 272 of the Internal Revenue Code of 1939, 26 U.S.C., Sec. 272, sets out the procedure to be followed. In substance this section states that if a Commissioner determines there is a deficiency in respect of a tax, the Commissioner must send notice of such deficiency to the taxpayer by registered mail. Such a notice gives the taxpayer the right to file a petition with the Tax Court in order to contest this deficiency. It is important to note that a determination of a deficiency by the Commissioner is not the final civil tax liability of a taxpayer, for the Commissioner may not assess the deficiency or proceed to collect the tax until ninety days from the date the deficiency notice was sent, or until the decision of the Tax Court has become final, if a petition had been filed with the Tax Court. This is the procedure provided by Congress to determine a civil tax liability. As such, this section includes the negative of any other mode which the Government might avail itself in order to determine a civil tax liability. Such procedure has never been followed in the case of your Petitioner. No notice of deficiency has ever been received by your Petitioner. Your Petitioner has never had the opportunity to contest the deficiency in the Tax Court.

It therefore follows that it was impossible for your Petitioner to breach any condition of his probation as the sole method for determining civil tax liability has never been put into operation by the Commissioner. And it is submitted that the District Court sitting as a Criminal Court, cannot, under the Probation Act, decide what a probationer's civil tax liability is or should be. Nor can it decide how much of a payment by a probationer would satisfy an undetermined civil tax liability.

It then becomes readily apparent the question in the case at bar is not merely an abuse of discretion but whether the District Court had any discretion in the matter at all. It is submitted that such a probation condition is inoperative and of no effect until a civil tax liability has been determined in the Tax Court, which, as has been provided by Congress, has sole jurisdiction of such matters. And, as has been stated by this Court in the *Botany* case, this is the sole method of such a determination. See also, *Heiner* v. *Diamond Alkali Co.*, 288 U. S. 502 at p. 507.

The question presented goes to the very foundation of the Probation Act and the methods provided by Congress for the collection and determination of a civil tax liability.

It is conceded that a Criminal Court, as a condition of probation, can order restitution for *actual* damage or loss caused by the offense for which conviction was had. *Karrell* v. *United States* (9th Cir., 1950) 181 F. 2d 981, cert. den. 340 U. S. 891; *United States* v. *Follette* (D.C., Pa., 1940) 32 F. Supp. 953.

It is submitted that a Criminal Court, through the Probation Act, cannot compel a probationer to pay, settle, compromise, or make effort to pay any additional undeterminated, unliquidated, civil tax deficiency, which the Pro-

bationer protests that he doesn't owe. If it can, it becomes then merely a substitute for the Tax Court, with the further vice that the probationer's civil tax liability is determined in a summary hearing under considerable duress. This method of determining a civil tax liability has not been provided by Congress, and has been inferentially condemned by this Court in the *Botany* case. It should be more specifically condemned here.

The Government has argued, and will probably argue in this Court, that the Petitioner waived his right to a notice of deficiency and his right to file a petition with the Tax Court because he signed certain waivers of restrictions (R. 115-116). However, it must be noted that these waivers contain the following conditional provisions which were inserted by the Government:

> "This waiver of restrictions *is subject to acceptance by the Commissioner* on the basis of the settlement hereinbefore proposed and if not accepted, it will be of no force or effect.
>
> *"If this proposal is accepted*, the taxpayer agrees not to file thereafter any claim for refund for the year 1945; and upon request of the Commissioner, will execute at any time a final closing agreement under the provisions of Section 3760 of the Internal Revenue Code." (Emphasis supplied).

The waiver also states on its face that it is not a final closing agreement under Section 3760 and does not preclude the assertion of a further deficiency nor does it extend the statutory period of limitation.

The Petitioners will show, if this petition is granted, that the Courts of Appeal and the District Courts have consistently held that similar waivers are not binding upon either the taxpayer or the Government nor do they waive the rights granted to a taxpayer under Section

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272(A)(1) of the Internal Revenue Code of 1939. This, because of the conditions above quoted which were inserted by the Government.

Indeed, the Court of Appeals for the Seventh Circuit only recently ruled that a similar waiver was not binding upon the taxpayer, *Bennett* v. *United States* (7th Cir., 1956) 231 F. 2d 465. The decision in this case and similar cases is bottomed upon the reasoning of the Courts that in asserting this condition the Government creates an informal compromise agreement which must be accepted by the Commissioner as provided under Section 3761 of the 1939 Internal Revenue Code. The record shows there was no acceptance by the Commissioner of any of the waivers executed by the Petitioner. In addition, the testimony by a Government witness at the revocation of probation hearing shows that the Government intended the waiver to be accepted by the Commissioner in Washington in order to be binding (R. 33).

The Petitioner and wife (as joint taxpayers) have instituted action against the District Director of Internal Revenue at Milwaukee, Wisconsin.(1) They seek an injunction to restrain said District Director from making any tax assessments against the Petitioner and wife for the years 1945, 1946 and 1947 until the expiration of the 90-day period after notice of a determination of deficiency is mailed to the plaintiffs and that certain levies heretofore made by the District Director be declared null and void. The Government moved for a dismissal setting up among other things, the waivers signed by Petitioner and wife. The District Court denied the Government's

(1) *Harold G. Steiner and Ollie Mae Steiner* v. *George Reisimer* 56-C-140, United States District Court, Eastern District of Wisconsin.

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Motion for dismissal in an opinion rendered February 15, 1957, attached hereto as Appendix "B". The Court stated that had the waivers not been accepted, it would be as if they had never been signed by your Petitioner.

Therefore, it becomes clear that Petitioner's tax liability has never been determined according to law. Having no civil tax liability to pay, it was a gross abuse of discretion for the District Court to revoke his probation for failure to pay what, in effect, doesn't exist. In fact, under these circumstances, the Court had no discretion to exercise.

II.

The Court of Appeals for the Seventh Circuit has rendered a decision in conflict with a decision of the Court of Appeals for the Third Circuit.

The Court of Appeals for the Third Circuit has recognized that a probation condition similar to the one in the case at bar is invalid, or even if not invalid may only become operative when there has been a final determination of the probationer's civil tax liability according to law.

In *United States* v. *Stoehr* (3rd Cir., 1952) 196 F. 2d 276, the defendant was placed on probation and as a condition of probation it was ordered that he pay, not later than ninety days after commencement of Probation, all income taxes due to the Government plus interest and penalties. The Third Circuit recognized the Probation Act, which allows the Court to order restitution, limits the Court to actual damages or loss caused by the offense of which defendant is convicted. The Court also recognized that these actual damages can only be determined by the civil methods provided by Congress and not in a criminal action. The Court held the condition could only be interpreted to mean that probation would be conditioned on the

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payment by defendant of all income taxes finally determined. Until such final determination had been made the condition was inoperative.

The Court of Appeals below attempted to differentiate the *Stoehr* case upon its facts. However, the facts are not controlling. What is important is that the Court of Appeals for the Third Circuit recognized that a Criminal Court has no jurisdiction under the Probation Act to determine the defendant's civil tax liability. It also recognized a condition of payment of tax liability would not become operative until such tax liability had been determined by the method provided by law, not by any actions of a Criminal Court.

The opinion of the Court of Appeals below also ignores the record in the case at bar which plainly shows that effort to pay was not what the District Court had in mind as an interpretation of the probation condition. Even if effort to pay be taken at face value, there can be no effort to pay that liability which has never been determined. The Court of Appeals for the Third Circuit correctly recognized that such a final determination of a civil tax liability properly belongs in the Tax Court and not in the Criminal Court.

The petitioner's liberty is to be restrained by virtue of the revocation of probation. Probation was based on an invalid, inoperative condition. The record is clear that Petitioner did not violate this condition.

The administration of justice in the District Court of the United States will be materially benefited by a clarification of this conflict between Circuits and a clear decision relative to a probation condition as involved in the instant case.

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PRAYER FOR CERTIORARI.

Wherefore, Petitioner, for the reasons outlined above, prays that this Court grant its Writ of Certiorari to review the proceedings below.

Respectfully submitted,

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APPENDIX "A".

Statutes.

I. Chapter 231—*Probation,* 18 U.S.C. Section 3651-3653.

Section 3651. *Suspension of sentence and probation.*

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States, except in the District of Columbia, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

The court may revoke or modify any condition of probation, or may change the period of probation.

The period of probation, together with any extension thereof, shall not exceed five years.

While on probation and among the conditions thereof, the defendant—

May be required to pay a fine in one or several sums; and

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May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and

May be required to provide for the support of any persons, for whose support he is legally responsible.

The defendant's liability for any fine or other punishment imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation. June 25, 1948, c. 645, 62 Stat. 842.

Section 3653. *Report of probation officer and arrest of probationer.*

When directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

Whenever during the period of his probation, a probationer heretofore or hereafter placed on probation, goes from the district in which he is being supervised to another district, jurisdiction over him may be transferred, in the discretion of the court, from the court for the district from which he goes to the court for the other district, with the concurrence of the latter court. Thereupon the court for the district to which jurisdiction is transferred shall have all power with respect to the probationer that was previously possessed by the court for the district from which the transfer is made, except that the period of probation shall not be changed without the consent of the sentencing court. This process under the same conditions may be repeated whenever during the period of his probation the probationer goes from the district in which he is being supervised to another district.

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At any time within the probation period, the probation officer may for cause arrest the probationer wherever found, without a warrant. At any time within the probation period, or within the maximum probation period permitted by section 3651 of this title, the court for the district in which the probationer is being supervised or if he is no longer under supervision, the court for the district in which he was last under supervision, may issue a warrant for his arrest for violation of probation occurring during the probation period. Such warrant may be executed in any district by the probation officer or the United States marshal of the district in which the warrant was issued or of any district in which the probationer is found. If the probationer shall be arrested in any district other than that in which he was last supervised, he shall be returned to the district in which the warrant was issued, unless jurisdiction over him is transferred as above provided to the district in which he is found, and in that case he shall be detained pending further proceedings in such district.

As speedily as possible after arrest the probationer shall be taken before the court for the district having jurisdiction over him. Thereupon the court may revoke the probation and require him to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed. June 25, 1948, c. 645, 62 Stat. 842, amended May 24, 1949, c. 139, section 56, 63 Stat. 96.

II. Internal Revenue Code of 1939; Supplement L—Assessment and Collection of Deficiencies, 26 U.S.C. Section 272.

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(Appendix)

Section 272. Procedure in general.

(a) (1) *Petition to The Tax Court of the United States.* If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a petition with The Tax Court of the United States for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653 (a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. In the case of a joint return filed by husband and wife such notice of deficiency may be a single joint notice, except that if the Commissioner has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, duplicate originals of the joint notice must be sent by registered mail to each spouse at his last known address. If the notice is addressed to a person outside the States of the Union and the District of Columbia, the period specified in this paragraph shall be one hundred and fifty days in lieu of ninety days. As amended October

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21, 1942, 4:30 p.m., E. W. T., c. 619, Title V, section 504 (a), (c), 56 Stat. 957; December 29, 1945, c. 652, Title II, section 203 (a), 59 Stat. 673.

(b) *Collection of deficiency found by Board.* If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

(c) *Failure to file petition.* If the taxpayer does not file a petition with the Board within the time prescribed in subsection (a) of this section, the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the collector.

(d) *Waiver of restrictions.* The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency.

• • •

III. Internal Revenue Code of 1939, Section 145, Penalties.

• • •

(b) *Failure to collect and pay over tax, or attempt to defeat or evade tax.* Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or

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truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

• • •

IV. Internal Revenue Code of 1939, Section 3761.

Section 3761. Compromises.

(a) *Authorization.* The Commissioner, with the approval of the Secretary, or the Under Secretary of the Treasury, or of an Assistant Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense.

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APPENDIX "B".

copy mailed to attorneys for parties by the Court pursuant to Rule 77(d) F.R.C.P., and Rule 21-A of District Court. 2/15/57

UNITED STATES DISTRICT COURT
Eastern District of Wisconsin
Harold G. Steiner and
Ollie Mae Steiner,
Plaintiffs,

v.

George Reisimer,
Defendant.
No. 56-C-140
U.S. Dist. Court, East Dist. of Wis.
Filed
Feb. 15, 1957
as.....o'clock.....M
Dale E. Ihlenfeldt, Clerk

OPINION.

This case is before the Court on the motion of the defendant to dismiss a complaint for an injunction. The complaint in question was filed by the plaintiffs, taxpayers, and asked that the defendant, as District Director of the Internal Revenue Service for the State of Wisconsin, be enjoined from making any tax assessments against the plaintiffs until the expiration of the 90 day period after notice of a determination of deficiency is

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mailed to the plaintiffs, and that certain levies, heretofore made by the defendant, be declared null and void. No answer has been filed by the defendant.

The grounds for dismissal urged by the defendant are as follows: that this suit is prohibited by Section 7421 of the Internal Revenue Code of 1954; that the Court is without jurisdiction over the subject matter of the action; that the complaint fails to state facts upon which relief can be granted; that waivers of restrictions on assessment and collection of deficiency in tax were executed by the plaintiffs; and that the plaintiffs have an adequate remedy at law.

After considering the contents and allegations of the complaint filed herein and the arguments of counsel, it is the opinion of the Court that, basically, three issues are presented for decision. First, does the conditional waiver of restrictions, executed by the plaintiffs, relieve the defendant from the duty of sending a 90 day notice before assessment and collection of deficiencies? Second, have the plaintiffs failed to state facts upon which relief can be granted. Third, does this Court have jurisdiction to enjoin the District Director according to the terms of the relief prayed for, and to declare certain levies null and void?

The complaint alleges that the plaintiffs executed two 870 Agreements, which were entitled "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax". The executed documents were offers in compromise, which were never accepted by the Commissioner. The documents contain a typed restriction which reads as follows:

> "This waiver of restrictions is subject to acceptance by the Commissioner on the basis of the settlement hereinbefore proposed, and if not accepted, it will be of no force or effect."

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It is alleged, and such allegation is not contested by the defendant, that no 90 day notice of deficiency was ever sent to the plaintiffs; that despite that fact, the Director has levied upon certain bank deposits of the plaintiffs.

It is the defendant's position that the fact that the defendant has actually levied upon property of the plaintiffs indicates an acceptance of the Form 870 Agreements, including the conditional waivers contained thereon.

Plaintiffs contend that this Court may enjoin the action of the defendant, because defendant has not complied with the provisions of Title 26 U.S.C.A., No. 7421 and No. 6213.

Section 7421 (a) provides:

> "Except as provided in sections • • • 6213 (a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

Section 6213 provides, in substance, that no assessment of a deficiency shall be made or prosecuted until 90 days after a notice of deficiency has been mailed to the taxpayer. This section provides that the making of such an assessment, during the time such prohibition is in force, may be enjoined by a proceeding in the proper court.

The waivers of restrictions executed by the plaintiffs are clearly conditioned upon the acceptance by the Commissioner of an offer of settlement. Since the Commissioner did not accept the waivers of restrictions, the legal effect would seem to be the same as if the plaintiffs had never executed a waiver of any kind. Under these circumstances the Commissioner is obligated to send a 90 day notice of deficiency, so that the taxpayer has an opportunity to go before the Board of Tax Appeals for a redetermination of his deficiency.

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The defendant has made no showing that he has the authority to accept a Form 870 Agreement on behalf of the Commissioner. But even if he has in fact such authority, this Court doubts that the mere act of levying would be a sufficient form of acceptance to conform to the terms of the conditional waiver of restrictions executed by the plaintiffs.

The facts of the present case somewhat parallel those considered in *Ventura Consolidated Oil Fields* v. *Rogan*, 86 F. 2d 149 (C.A. 9, 1936). In that case the taxpayer had signed a waiver of restrictions, which was never accepted by the Commissioner. The Commissioner thought that the unaccepted waiver was a waiver of the 60 day period then in force, and assessed taxes. The Court held that this procedure deprived the taxpayer of the remedy of going to the Board of Tax Appeals. The Court further stated that there was no reason to believe that the taxpayer agreed to waive his administrative review if his order of compromise were rejected. (1)

The Court is of the opinion that the cases cited by the defendant are highly distinguishable. But for the sake of brevity, it shall not comment on them.

As to the second issue presented for decision, it was stated in 2 Moore, Federal Practice, No. 12.08:

> "For the purposes of the motion, the well pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted. A complaint may be dismissed on motion if clearly without any merit: and this want of merit may consist in an absence of

(1) As to the general validity of Form 870 Agreements, see *Davidson* v. *United States*, 58 Fed. Sup. 481 (1944).

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law to support a claim of the sort made, or of facts sufficient to make a good claim • • • But a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proven in support of the claim."

This Court, after study of the complaint, cannot say hat the plaintiffs are entitled to no relief under any tate of facts which could be proven in support of their laim.

It is the opinion of the Court that it has jurisdiction of his action under the provisions of Title 26 U.S.C.A. No. 6213 (a).

For the foregoing reasons, the motion of the defendant s denied.

Dated, Milwaukee, Wisconsin, this 15th day of February, 1957.

/s/ K. P. Grubb
U. S. District Judge

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APPPENDIX "C".

IN THE

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

No. 11791. SEPTEMBER TERM AND SESSION, 1956.

United States of America,
Plaintiff-Appellee,

vs.

Harold G. Steiner,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Wisconsin.

January 7, 1957.

Before FINNEGAN, LINDLEY and SCHNACKENBERG, *Circuit Judges.*

FINNEGAN, *Circuit Judge.* Convicted upon his plea of nolo contendere under the first count of an indictment charging violation of 26 U. S. C. § 145 (b), Steiner, defendant-appellant, was fined (1) $10,000 and sentenced to the custody of the Attorney General for eighteen months; but that judgment entered June 1, 1954 contained this

---

(1) It was also ordered that the $5000 deposited by defendant as bail "be applied as part payment of fine, and that execution of sentence be stayed as to the balance of the fine for six months."

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order of probation. [Rule 32(b) Fed. Rules Criminal Procedure 18 U.S.C.]:

> "It is Further Adjudged that prison terms be suspended and defendant placed on probation for period of two years from this date, *on condition that defendant make every effort to pay tax liability to the United States.* (Italics ours)."

That was a final and appealable judgment. *Korematsu* v. *United States*, 319 U. S. 432 (1943), *Berman* v. *United States*, 302 U. S. 211 (1937). But the appeal now before us is from an order, dated May 31, 1956, revoking Steiner's probation, after a hearing, and committing him "to the custody of the Attorney General for a period of eighteen months, imposed in the original judgment."

Almost two years after he has been under the order placing him on probation, Steiner challenges the italicized condition, embodied in it, and already quoted. "Probation or suspension of sentence comes as an act of grace to one convicted of crime * * *" *Escoe* v. *Zerbst*, 295 U. S. 490, 492 (1935). By accepting probation on the condition, now challenged, without earlier seeking review of the 1954 order within the time (Rule 37, Federal Rules Criminal Procedure, 18 U.S.C.) provided for appeals, defendant is foreclosed from attacking it. From the record it appears that Steiner was represented by two attorneys at the time sentence was imposed and probation granted, and when the district judge and defendant exchanged these remarks:

> "The Court: One of the conditions under which I am placing you on probation is that you make every reasonable effort and every honest effort to satisfy your tax liability with the government. It won't be up to the Internal Revenue Department to determine whether you are making that effort; it will be up to this court. It will be that you have to satisfy this court to make every reasonable effort—
>
> A. I think I can do that. I will try.

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Q. (Continuing)—to discharge this liability.

The Clerk: Fine of $10,000; the defendant committed to custody of the Attorney General for eighteen months, and sentence be suspended and the defendant placed on probation for a period of two years, conditioned that the defendant make every effort to pay the tax liability to the U. S. Government.

The Court: And that the court shall be the judge of whether this effort, your utmost effort—

A. I think that's fair, your honor."

Even if Steiner's belated attempt at eradicating the condition, "that he make every effort to pay tax liability," is before us, by indirection at least, we refrain from disturbing the judicial discretion ordering it, and exercised under 18 U. S. C. § 3651, providing for granting probation:

> "When * * * the ends of justice and the best interest of the public as well as the defendant will be served thereby * * * upon such terms and conditions as the court deems best."

Judicial discretion is the fabric from which probation is cut and tailored. See e.g. *Berra* v. *United States*, 221 F. 2d 590 (8th Cir. 1955) affirmed 351 U.S. 131 (1956). We think defendant's argument erected on the restitution clause of § 3651 lacks persuasive force. *United States* v. *Stoehr*, 196 F. 2d 276 (3rd Cir. 1952) strongly pressed on us by defendant, contains a dissimilar condition of probation requiring *payment* of taxes within ninety days after probation commenced upon the defendant's release from prison—he having been sentenced to imprisonment on other counts. Determination of tax liability and efforts to pay taxes are distinguishable.

But *effort* to pay is what was required of Steiner. After reading the record made during the probation revocation hearings we are satisfied that the district judge's discre-

tion was again unabused. *Burns* v. *United States,* 287 U.S. 216 (1932) instead of providing the comfort which defendant seems to find in it, lends strength to our approval of the proceeding held below. See also; *Kirsch* v. *United States,* 173 F 2d. 652 (8th Cir. 1949). Other points urged by defendant display a robust abandon of the record revealing ample, timely and explicit notice of, and alleged grounds for, revocation, as well as Steiner's unqualified declaration that he was going to act as his own attorney. (*) Indeed he questioned some of the five witnesses who testified in support of the petition to revoke probation. By sorting out this printed record it reveals that the first stage of the revocation proceeding began April 24, 1956 and was resumed May 31, 1956. The first extensive hearing adequately demonstrates Steiner's acute and astute grasp of the situation and, the continuance given him for the express purpose of reflection.

The order appealed revoking probation is affirmed.

AFFIRMED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

(*) See e. g. T. R. 106 when at the continued hearing, May 31, 1956, after stating some other matters, Mr. Steiner said to the district judge: " * * * As you know, when I appeared here before you the last time, I was not represented by counsel; and as a result—

"The Court: But you had every opportunity to appear by counsel. No one prevented you—

"The Defendant: No, no, I am not using that as an excuse."

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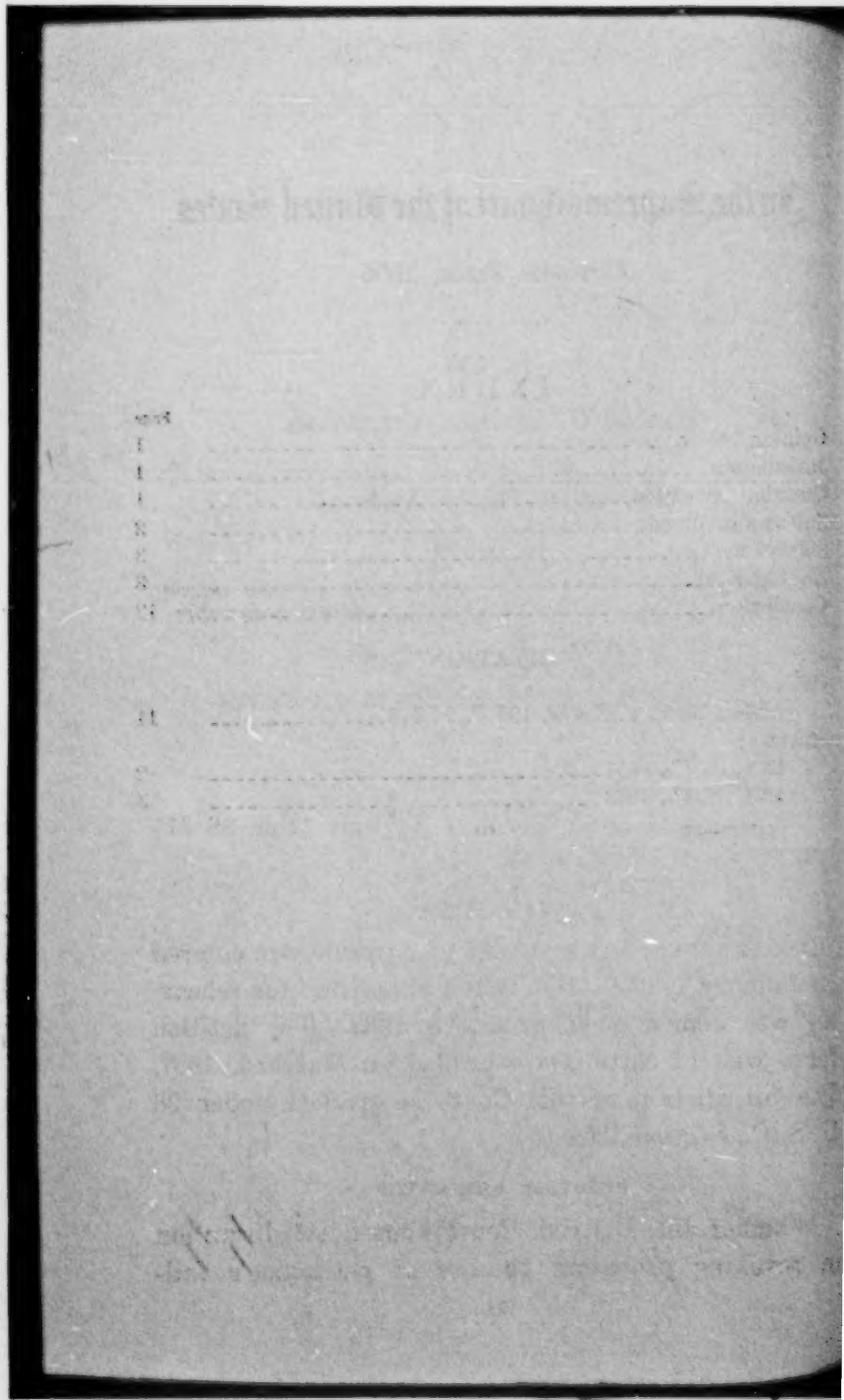

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 815

HAROLD G. STEINER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 28–31) is reported at 239 F. 2d 660.

JURISDICTION

The judgment of the Court of Appeals was entered on January 7, 1957 (Pet. 28), and petition for rehearing was denied on February 4, 1957. The petition for a writ of certiorari was filed on March 5, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED

Whether the District Court abused its discretion in revoking probation because of petitioner's fail-

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ure to comply with the condition of probation that petitioner make every effort to pay his civil tax liability where, against a tax assessment of over $200,000, petitioner had offered only $18,900 and refused to deposit with the court or disclose the location of an admitted $100,000 worth of municipal bonds.

STATUTES INVOLVED

18 U. S. C.:

SEC. 3651. SUSPENSION OF SENTENCE AND PROBATION.

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States, except in the District of Columbia, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

The court may revoke or modify any condition of probation, or may change the period of probation.

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The period of probation, together with any extension thereof, shall not exceed five years.

While on probation and among the conditions thereof, the defendant—

May be required to pay a fine in one or several sums; and

May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and

May be required to provide for the support of any persons, for whose support he is legally responsible.

The defendant's liability for any fine or other punishment imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation.

SEC. 3653. REPORT OF PROBATION OFFICER AND ARREST OF PROBATIONER.

* * * * *

As speedily as possible after arrest the probationer shall be taken before the court for the district having jurisdiction over him. Thereupon the court may revoke the probation and require him to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed.

STATEMENT

On December 17, 1952, petitioner was indicted in the United States District Court for the Eastern

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District of Wisconsin on two counts charging wilful attempted evasion of his individual income taxes for the years 1946 and 1947, in violation of Section 145 (b) of the Internal Revenue Code of 1939. (R. 3–4.) On September 14, 1953, petitioner entered a plea of *nolo contendere* as to Count 1, and petitioner was adjudged guilty thereon. (R. 4–5.) Count 2, alleging criminal evasion of some $24,000 (R. 13), was dismissed (R. 11).

Before sentencing, the court allowed petitioner time to make an effort to settle his tax liability. (R. 26.) A two-day conference was held on May 11 and 12, 1954, with petitioner and his representatives to arrive at a settlement of petitioner's civil liability and penalties prior to the date set for sentencing. As a result of the conference, the Government's claim that taxpayer owed $334,000 was reduced to $244,000. This was incorporated into two agreements which were submitted to petitioner for signature. (R. 28–31, 86; Exs. 1, 2, R. 115–116.)

On June 1, 1954, at the time of sentencing, petitioner's counsel represented to the court that they were making every effort to meet petitioner's tax liability, that petitioner had already paid in $17,707.02, the net tax alleged in Count 1 of the indictment as criminally evaded, and that they were then preparing an offer in compromise. (R. 12.) At the conclusion of these representations, petitioner was then sentenced to pay a fine of $10,000 and committed to the custody of the Attorney General for eighteen months. The prison term was suspended and petitioner was placed on probation for two years "on condition that

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defendant make every effort to pay tax liability to the United States." (R. 4–5.) The trial judge explained this condition of probation to petitioner as being "that you make every reasonable effort and every honest effort to satisfy your tax liability with the government. It won't be up to the Internal Revenue Department to determine whether you are making that effort; it will be up to this court. It will be that you have to satisfy this court to make every reasonable effort to discharge this liability." (R. 21–22, 24, 109.) Petitioner did not seek review of this condition of probation.

Since petitioner had failed to sign the agreements mentioned above, the Internal Revenue Service started to assess the original amount of $334,000. When petitioner's accountant heard of this, he requested time to enable him to get petitioner to sign the agreements consenting to the assessment of $244,000. Petitioner finally signed the agreements on September 7, 1954, and returned them to the Service. (R. 38–42.)

The actual assessments against petitioner were then made, based on the executed agreements in the modified amount of $244,000. (R. 56–57; Exs. 5, 6, R. 135–137.)

The extent of petitioner's compliance with the court's order that he make a reasonable and honest effort to discharge his tax liability was as follows:

On September 10, 1954, an offer in compromise was made in the amount of $18,900, in addition to the sum of $17,707.02, which had been paid in before sentencing, based on the grounds that the petitioner

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was unable to pay the amount assessed. However, the financial statement, required to accompany the offer, showed that petitioner had $155,000 which could have been paid on the tax liability. Moreover, the Internal Revenue Service's investigation revealed that petitioner had assets of $255,000 which could have been applied against the tax liability. By letter dated May 13, 1955, the offer in compromise was rejected. (R. 42–43, 53.)

On May 19, 1955, the Internal Revenue Service attempted to collect the amount of the deficiency by levy against petitioner's property. During a discussion of the levy with petitioner, the latter stated that he had fifty to eighty thousand dollars in cash and negotiable securities which he had hidden, that he would bury the money, let it rot in the ground and go to jail before he would pay it over to the Government. (R. 60–62.)

On June 1, 1955, petitioner made a second offer in compromise in exactly the same amounts as had been contained in the first offer but based upon doubt as to liability. In support, he submitted an audit of his books which had previously been considered by the Internal Revenue Service as early as 1951. By letter dated August 16, 1955, petitioner was notified of rejection of the offer, since the audit, upon which the offer was based, had not included cash payments received in petitioner's black market operations. (R. 50–52, 73–75.)

Petitioner's probation officer informed petitioner that revocation proceedings were being started and suggested that if petitioner would make a deposit with

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the court pending settlement of his tax liability such an offer would be considered. (R. 52–53.) Proceedings for revocation were begun on March 20, 1956. (R. 6.)

On April 24, 1956, at the hearing on revocation of probation [1] the court reviewed what had been done by

---

[1] The petitioner makes oblique reference to the fact that petitioner did not have an attorney representing him at the revocation proceedings. (Pet. 7.) However, petitioner had been represented by two attorneys at the time of sentence when the condition of probation had been imposed. (R. 11.) Prior to the revocation proceedings, the United States Attorney and the court contacted petitioner's attorney of record. When petitioner thereafter appeared without counsel at the revocation proceedings on April 24, 1956, the following colloquy occurred (R. 25):

"The COURT. And you were advised to be here with your counsel.

"The DEFENDANT. Yes, sir.

"The COURT. And is there any reason why you are not here with an attorney?

"The DEFENDANT. Yes, sir. Mr. Brazeau was my attorney in this criminal case; and then, when it came to the civil action, he advised me to get a tax lawyer.

"And when this thing came up for revocation of probation, why, this tax lawyer wanted to bring in another attorney, who wanted to charge me $3,000 to appear here for me, and I just felt that I couldn't afford to pay that amount of money to be represented, so I will represent myself.

"The COURT. All right. You don't really need a lawyer in this proceeding. All you have got to do is state what the facts are. That's all.

"The DEFENDANT. Yes, sir. I figured maybe that right might win out over might."

At the adjourned revocation hearing on May 31, 1956, petitioner stated to the court (R. 106):

"As you know, when I appeared here before you the last time, I was not represented by counsel; and as a result——

"The COURT. But you had every opportunity to appear by counsel. No one prevented you——

"The DEFENDANT. No, no, I am not using that as an excuse."

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petitioner to settle his tax liability and finally asked petitioner if he was willing to deposit with the court his municipal bonds in the sum of $100,000 pending the final settlement of his tax liability, stating that if petitioner made that kind of offer he would consider that petitioner had acted in good faith under the circumstances. Petitioner replied that he could not do that. Nevertheless, the court gave petitioner until June 1 to think it over, which was the time petitioner's probation was to expire, and continued the case until May 31, 1956 (R. 104.)

When petitioner appeared again on the latter date, the court stated that it had given petitioner the opportunity to show that he was making a reasonable effort if he paid $100,000 into court, and that petitioner had not done this. The court found that petitioner had "utterly failed to make any reasonable effort to pay the tax liability." The court asked petitioner to disclose where the $100,000 in municipal bonds and other negotiable stocks which he had were located. Petitioner replied, "Well, I won't disclose that, sir." Probation was revoked and petitioner was committed to the custody of the United States Marshal to serve his sentence. (R. 108–111.)

ARGUMENT

1. Petitioner admits that the question on review of a revocation of probation is whether there has been an abuse of discretion. (Pet. 9.)

The record discloses that petitioner's attempt to settle his tax liability over the two-year probationary period consisted of two offers in compromise. It

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is clear that neither offer in compromise constituted a serious effort by petitioner to settle and pay his tax liability. Both offers were for the same amount, $18,900, plus $17,707.02 already paid in before sentencing. On his first offer in compromise, petitioner had declared under penalties of perjury that he was unable to pay his tax liability, but investigation disclosed that petitioner in fact had funds to pay his entire tax liability. Petitioner's second offer in compromise was based on an old audit made of petitioner's books and records, previously considered by the Internal Revenue Service, which did not include his income received from black market side payments. The audit was worthless since substantially all of petitioner's tax liability arose from the black market operations. Thus both offers in compromise had the appearance but lacked the substance of compliance with the court's condition of probation.

Despite the conclusive evidence that petitioner had failed to obey the probation condition that he make an honest effort to settle and pay his tax liability, the court gave petitioner a further opportunity to obey it at the April 24, 1956 hearing. The court stated that if petitioner would deposit with the court the $100,000 in municipal bonds he possessed pending the final settlement of petitioner's tax liability, the court would consider petitioner had acted in good faith. Even though petitioner replied that he was unwilling to do this, the court nevertheless allowed petitioner until the end of his period of probation to consider the matter. When petitioner appeared on May 31, 1956, he again refused to comply with the

court's direction to deposit with it the $100,000 in municipal bonds and securities and indeed refused to disclose their location.

Petitioner attempts to obfuscate his failure to make a reasonable effort to settle his tax liability by contending that it was impossible for him to breach any condition of probation on the grounds that the proper method for determining his civil tax liability had never been put into operation by the Commissioner. (Pet. 11.)[2] Apparently, petitioner thought all along that there had been a proper determination of his civil tax liability since he filed two offers in compromise of it. But the entire contention is beside the point since, under the court's statement of what would satisfy the condition of probation, there need not have been any determination of petitioner's civil liability. Petitioner ignores the fact that the court concluded at the revocation hearing that it would judge petitioner's effort to pay his tax liability by whether or not petitioner would deposit $100,000 of his securities with the court pending the eventual settlement. There was thus no requirement that petitioner make any offers in compromise or indeed take any further steps to settle his tax liability.

---

[2] Actually, the record is clear that there had been a determination of petitioner's tax liability. An assessment based upon the amount of the agreed-upon settlement had been made. (R. 56–57; Exs. 5, 6, R. 135–137.) Furthermore, the offers in compromise had been acknowledged by the Commissioner of Internal Revenue (Exs. 3, 4, R. 117, 131), and it was established that such offers in compromise could not be considered unless there had been a properly executed waiver on Form 870M (R. 40–41). Petitioner so understood this. (R. 36.)

All he need do was to make the deposit with the court.

2. Petitioner also contends (Pet. 14) that the decision of the court below in upholding the order of revocation is in conflict with *United States* v. *Stoehr*, 196 F. 2d 276, 284 (C. A. 3d). Petitioner says that the trial judge stated that the condition of probation could be complied with only by a *settlement* and *payment* of petitioner's civil tax liability. (Pet. 4, 9.) This is not so. The court stated that the petitioner must make an *honest effort* to settle and pay the tax. (R. 35; see R. 21–22, 24, 107.)

As was pointed out by the court below (Pet. 30), what was condemned in the *Stoehr* case was the requirement that the probationer pay all of his income taxes within ninety days of release from prison.[8] Such a condition would indeed have short-circuited the orderly determination of tax liability. However, a condition that the probationer must pay within a definite period of time is entirely different from a condition that a probationer must make an effort during his probationary period to settle and pay his tax liability. What this actually meant in practice was demonstrated when the court stated it would be satisfied that petitioner had made such an effort if petitioner merely made a deposit with the court of his municipal bonds *pending* settlement of his tax liability.

---

[8] The condition of probation in the *Stoehr* case was contested by a timely appeal. The court below found that here petitioner was challenging the condition of probation almost two years after the order, and was foreclosed at this late date from attacking it. (Pet. 29.)

The court exercised a reasonable discretion in revoking petitioner's probation after his refusal to make the $100,000 deposit of negotiable municipal bonds, especially in view of the background of the case showing that petitioner threatened to hide or bury the securities rather than permit the Government to get at them and culminating in petitioner's blatant refusal in open court to disclose their whereabouts.[4] The court's exercise of discretion should not be disturbed.

3. The case turns on the particular facts involved and raises no question of general significance.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
JOSEPH M. HOWARD,
LAWRENCE K. BAILEY,
Attorneys.

APRIL 1957.

[4] That this request to deposit $100,000 in securities was not deemed by petitioner as being out of line with his actual tax liability is shown by petitioner's immediate question to the court: "Your Honor, could I consider that a settlement of this tax?" (R. 104.)

U. S. GOVERNMENT PRINTING OFFICE: 1957

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APR 1 2 1957

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 815

HAROLD G. STEINER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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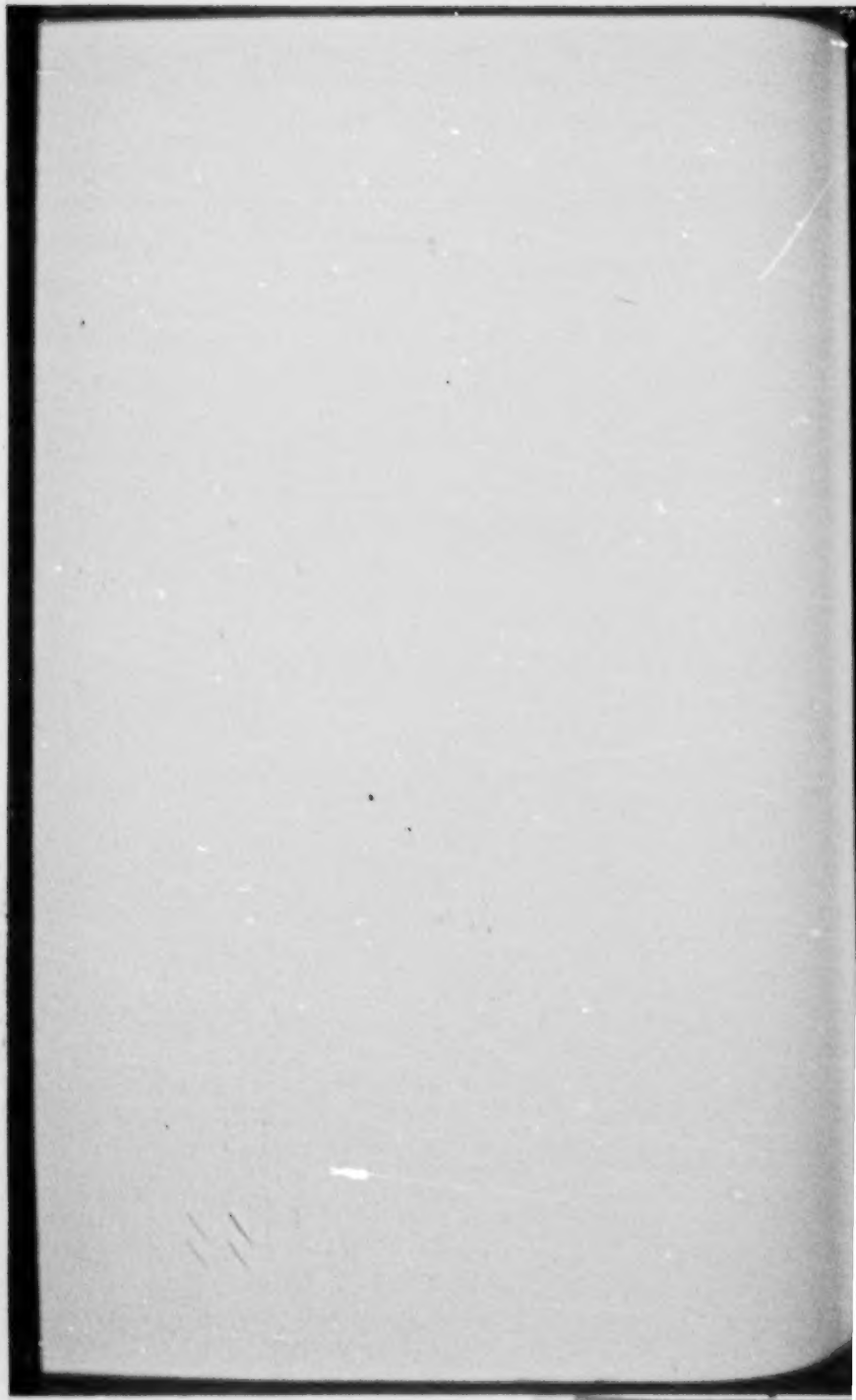

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 615

HAROLD G. STEINER,

Petitioner.

VS.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S REPLY IN OPPOSITION TO THE BRIEF FOR THE UNITED STATES.

ARGUMENT.

Initially, it is necessary for Petitioner to point out to the Court that nowhere in its Brief in Opposition has Respondent met the issues presented by the Petitioner. Respondent completely ignores the issue raised by Petitioner, of the Government failing to follow the statutory requirements for determining a civil tax liability.

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It becomes necessary, therefore, for Petitioner to apprise this Court of the sophistries contained in Respondent's Brief.

In its "Questions Presented" (Res. Brief 1-2) Respondent speaks of a "tax assessment of over $200,000." In its "Statement," Respondent speaks of "agreements" (Res. Brief 4-5) and "executed agreements" (Res. Brief 5). Again, on page 5 of its Brief, Respondent states the Internal Revenue Service started to "assess" Petitioner's tax liability.(1) Further, in its efforts to convince this Court that a tax liability has been determined, Respondent states that "assessment based upon the amount of the agreed-upon settlement had been made," (Res. Brief p. 10, F.N. 2).

Simply stated, the use of the above-quoted words is an articulate effort by Respondent to beg a principal issue in the case at bar. In fact they seek to establish a relationship and condition, by their own gratuitous characterization, completely rejected and not permitted by the facts. Such an effort by the Internal Revenue Service assess a deficiency is illegal by the terms of Sec. 272 of the Internal Revenue Code of 1939.(2) (Pet. 19-20).

---

(1) Respondent misstates the facts. Actually the Internal Revenue Service was preparing a 30-day letter which is neither an assessment nor a statutory notice of deficiency. (R. 38-39).

(2) The 1939 Internal Revenue Code is applicable to the case at bar; however, the procedure for determining deficiencies and assessments remains the same in the Internal Revenue Code of 1954, 26 U.S.C.A. Sec. 6212, 6213.

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3-27). The Petitioner has never received a statutory otice of deficiency. Respondent concedes this by its ilence. Therefore, by the provisions of this statute, no ssessment could have been made.

The incorrectly labeled "agreements" or "executed greements" are the conditional Waivers of Restrictions Ex. 1-2, R. 115, 116) which clearly were never accepted y the Commissioner of Internal Revenue as required ıpon their face. As such they are invalid and have no egal effect by the consistent holdings of Courts of Ap-ɔeal and the District Courts. (See Pet. 12-13; and Opinion of Judge Grubb set out in Appendix "B", Pet. 23-27). In ıddition, the record is clear these Waivers were only ıigned by Petitioner so that he could file an offer in ɔompromise, and if this was rejected, then the Waivers ıvould have no force and effect (R. 36, 61, 68, 69).

It follows that no legal assessment has ever been made of Petitioner's tax liability. No *agreement* has ever been entered into by him with the Government regarding his tax liability. As a matter of law, Petitioner has no tax liability at the present time for the years 1945, 1946 and 1947.

In an attempt to prejudice this Honorable Court, Respondent has made reference to alleged black-market operations of Petitioner (Res. Brief 6 and 9). Petitioner has never been indicted, much less convicted of such alleged operations. Such allegations by Respondent are strongly protested here as they were in the District Court. Such allegations were made in the District Court, not to show any wrongdoing on the part of Petitioner during his probation period, but to show alleged unreported income for the years 1945, 1946 and 1947. These allegations were completely unsupported by proof. They were improperly admitted in the record in the revoca-

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tion of probation hearing solely because Petitioner was without counsel. They had no probative value relative to the alleged issue of violation of probation. The vice of their admission is demonstrated by the Respondent's continued use of such improper allegations. They have nothing to do with the issue before this Court.

Respondent has also placed emphasis upon Petitioner's first offer of compromise, based on inability to pay, being accompanied by a financial statement which showed an ability to pay (Res. Brief 5-6, 9). Respondent fails to point out to this Honorable Court that Petitioner explained this was a mistake by Petitioner's attorney, unknown to the Petitioner, which Petitioner readily admitted. This explanation was accepted by the court below and the Internal Revenue Service (R. 50). The second offer of compromise submitted at the suggestion of the Internal Revenue Service was based upon a dispute as to the tax owed, a position to which Petitioner consistently and continually has adhered.

This inability of Respondent to present the complete facts is also reflected in the truncated quote on p. 12 of its Brief (Res. F.N. 4). The full passage between Petitioner and the Court follows (R. 104):

> "The Witness: Your Honor, Could I consider that a settlement of this tax?
>
> "The Court: If you made that kind of an offer of settlement, I would consider that you have acted in good faith under the circumstances.
>
> "The Witness: I don't need until June first to answer that, your Honor. I don't think I could in conscience do that."

Rather than consideration by Petitioner that the $100,000 was in line with his "actual tax liability," the full quote makes it patently clear Petitioner was, at that late date, resisting any effort to force him into paying a

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tax which had never been legally determined, and which he claimed he didn't owe. In the final analysis, Respondent's brief impliedly admits that no tax liability has ever been legally determined. Respondent rests its case upon the propriety of the criminal court's actions in attempting to force Petitioner into paying the criminal court $100,000 in settlement of the Respondent's $255,000.00 claim of a civil deficiency. And note, this was only a deficiency alleged by Respondent, not a legal assessment of taxes, nor a final assessment upon which Respondent would levy or collect.

The record in the instant case is clear that when the District Court was seeking to become a stakeholder of $100,000 it was at the same time losing jurisdiction over the Defendant either by the revocation of his probation or the expiration of his probation. Consequently, the District Court had no jurisdiction to act as a depositary.

However, the actual fact is that the attempt by the Respondent to emphasize this $100,000 item is solely for the purpose of prejudicing the Petitioner in the minds of this Honorable Court. The Respondent knows full well that the request of the District Court upon the Petitioner is not based upon any legal authority. Furthermore, the Respondent knows full well that the Petitioner was under no obligation to make a payment of $100,000 into either the District Court, the United States Attorney, or any other governmental body. Yet knowing this, the Respondent seeks, by way of emphasis, to create the impression that the issue in the instant case is a question of whether or not the Petitioner acted in "good faith".

Assume, *arguendo,* Petitioner had available $1,000,000 on hand to pay an alledged tax deficiency. Does that very fact estop him from claiming and asserting his full statutory rights for a proper, legal determination of his tax

liability? Apparently the Respondent would argue the availability of money causes the Petitioner to lose his legal right to have his actual tax liability properly determined.

The issue here is not a question of whether Petitioner acted, or failed to act, in "good faith" by complying with an illegal request to permit someone on behalf of the Government to act as a depositary. The issue is whether the improper condition of probation has been violated by the Petitioner.(*) The simple issue here is whether or not the Defendant has made "every effort to pay tax liability", which was the condition of his probation (R. 5).

The Respondent would have this Honorable Court believe the issue involved is that the condition of probation required Petitioner to pay a sizeable sum of money on deposit into the District Court. Because of Petitioner's refusal to do so the District Court had the right to revoke probation. Petitioner's refusal to put money on deposit with the Court was not a condition of probation. Therefore, it is not an issue before this Honorable Court.

The Respondent's Brief completely demonstrates that actually the revocation of probation hearing was an illegal means whereby the Government was seeking to obtain, through duress, access to Petitioner's financial resources. This conclusion is obvious from the fact that

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(*) Petitioner's action has recently received support by the decision of Judge Grubb involving a civil action in this very matter (See Opinion Pet. Appendix "B" pp. 23-27) Petitioner now finds himself facing imprisonment to pay a tax liability which Judge Grubb holds may not exist.

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after probation was revoked and the matter was at an end, the United States Attorney and the District Court continued to interrogate Petitioner as to the location of his securities (R. 111). This Honorable Court should not condone such improper usage of the criminal court.

Respondent asks this Court to sanction these actions by a lower Federal Court. On page 12 of its Brief, Respondent admits the sole error of Petitioner was that he failed to permit the Government "to get at them" (the $100,000 in securities), and refused to reveal their whereabouts. Is it wrong to refuse to bow to illegal demands? Congress has specifically provided that:

> "• • • No assessment of a deficiency in respect of the tax imposed by this chapter *and no distraint or proceeding in court for its collection shall be made, begun or prosecuted* until such notice [notice of deficiency] has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final." (Internal Revenue Code of 1939, Sec. 272(a)(1); Pet. 19-20) (Emphasis added).

That such a proceeding, as prohibited by the statute quoted above was held by the criminal court below, and was illegal and a gross abuse of discretion must appear obvious to this Court.

Finally, it must be pointed out that Respondent completely misapprehends *United States* v. *Stoehr* (3rd Cir., 1952) 196 F. 2d 276 (Pet. 14-15; Res. Brief 11). The attempted differentiation, by Respondent, of *Stoehr* from the case at bar completely escapes Petitioner. Probationer, in *Stoehr*, would have had six years and three months to determine and pay his tax liability. Yet, the Court in *Stoehr* held, and Respondent here admits, this would have "short-circuited" the orderly determination of Pro-

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bationer's tax liability. That is exactly what has happened in the case at bar. Yet, Respondent would have this Court believe that "effort to *settle and pay*" an undetermined tax liability based on an illegal tax assessment, is somehow to be distinguished from "payment" of income taxes not yet due the Government. The Court, in *Stoehr*, correctly recognized that until there is a final, legal determination of tax liability, such a probation condition, as involved in the case at bar, is inoperative.

Conclusion.

For the reasons expressed herein, and in his Petition, Petitioner prays that this Honorable Court grant its Writ of Certiorari to review the proceedings below.

Respectfully submitted,

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